...ION FILED
AUG 30 ...

(8)

No. 94-2135

In the Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING PETITIONER

CHARLES A. ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

23pp

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief in support of petitioner. Petitioner and respondent United States of America have consented to the filing of the brief; respondents South Louisiana Electric Cooperative Association and Cajun Electric Power Cooperative, Inc., have denied consent.

Amicus American Public Power Association ("APPA") is a nonprofit service organization incorporated under the laws of the District of Columbia since 1940. APPA represents more than 1750 of the 2000 publicly owned electric utilities in the United States. This proceeding is of great interest to APPA and its members. Most public power systems service small to medium size cities that may grow and seek to annex adjacent territories as population, political considerations, and economic considerations warrant. Yet those cities and towns frequently are surrounded by or adjacent to areas served by cooperatives that have received loans or loan guarantees from the Rural Utilities Service ("RUS"), formerly known as the Rural Electrification Administration ("REA"). APPA members therefore are concerned that the decision below, if not reviewed by this Court, will preclude them from providing service to customers who are brought into the corporate limits of their communities through natural annexation processes.

Amicus National League of Cities ("NLC") is a nonprofit corporation that was organized in 1924 to assist municipalities in performing their functions. Nearly 17,000 municipalities are members of and participate in activities of the NLC. The members of the NLC have a strong and active interest in legal issues affecting the powers and prerogatives of local governments, including issues that affect the ability of municipalities to define their boundaries according to state law and structure the provision of municipal services in ways that are politically and economically beneficial.

Amicus National Institute of Municipal Law Officers ("NIMLO") is a national nonprofit organization comprised of local government attorneys representing approximately 1500 cities, counties, and special municipal districts in the United States. NIMLO's members are responsible for advising their local governments on a wide range of matters, frequently including annexation, eminent domain, and the provision of

city services. Those issues of central importance to local governments are directly at issue in this case.

Amici have a compelling and continuing interest in the issue presented here: whether a municipality's exercise of eminent domain authority to condemn the property of a rural electric cooperative is preempted by the Rural Electrification Act, 7 U.S.C. 901 *et seq.* Because more than 2000 municipalities currently provide electric power to their residents, the exercise of municipal eminent domain authority against rural electric cooperatives occurs with great frequency. But the court of appeals announced what amounts to a categorical rule precluding the condemnation of the cooperatives' property. This holding will prevent municipalities from offering certain of their residents a desirable service in the form of low-cost electric power, will bar them from tapping new sources of revenue, and in many cases will make municipal annexations a practical impossibility. *Amici* therefore regard it as essential that the Court review the decision below.

Because the issue presented by this case is of exceptional importance to *amici* and their members, *amici* respectfully move for leave to file the attached brief in support of petitioner.

Respectfully submitted.

CHARLES A. ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

AUGUST 1995

QUESTION PRESENTED

Whether a municipality's exercise of eminent domain authority to condemn the property of a rural electric cooperative, so that the municipality may provide utility service to all of its residents, is preempted by the Rural Electrification Act, 7 U.S.C. 901 *et seq.*

TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . (i)

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	Pages
Arkansas Electric Cooperative Corp. v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983)	2, 7, 8, 12-14
City of Rochester v. *Peoples Cooperative Power Ass'n, Inc.*, 505 N.W.2d 621 (Minn. App. 1993)	10, 11
Decatur County Rural Electric Membership Corp. v. *Public Service Co.*, 301 N.E.2d 191 (Ind. 1973)	9, 10
Hillsborough County v. *Automated Medical Laboratories*, 471 U.S. 707 (1985)	11
Louisiana Light & Power Co. v. *City of Thibodaux*, 360 U.S. 25 (1959)	3, 12
Madisonville Traction Co. v. *Saint Bernard Mining Co.*, 196 U.S. 239 (1905)	12
Maryland v. *Louisiana*, 451 U.S. 725 (1981)	11
New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995)	11, 12
Public Utility Dist. No. 1 of Franklin County v. *Big Bend Electric Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980)	10
Public Utility Dist. No. 1 of Pend Oreille County v. *United States*, 417 U.S. 200 (9th Cir. 1969)	10

TABLE OF AUTHORITIES - Continued

Pages

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)] 12

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 7

Wabash Valley Power Ass'n v. *REA*, 903 F.2d 445 (7th Cir. 1990) 7, 8, 14

Statutes and Regulations

7 C.F.R. 1710.112(b)(5) 7

7 U.S.C. 901 2

7 U.S.C. 902 10

7 U.S.C. 902(a) 6

7 U.S.C. 913 . . . . . 6, 10

7 U.S.C. 1926(b) 8

Act of May 20, 1936, ch. 432, Title I, § 13, 49 Stat. 1367 9

Miscellaneous

80 Cong. Rec. 5315 (1936) 7

80 Cong. Rec. 5316 (1936) 13

Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. (1936) 13

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICI CURIAE*

The interests of the *amici* are set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The decision below is of enormous practical importance. There can be no doubt that the exercise of municipal

condemnation authority against rural electric cooperatives occurs with considerable frequency, and is a matter of great significance to the operation of municipal governments and utilities. The court of appeals, however, announced what amounts to a categorical rule precluding the exercise of that authority. Yet the court's rationale for its rule — its conclusion that financial pressures may be imposed on rural electric cooperatives by the condemnation of REA-financed facilities located in densely populated service areas annexed by the municipality — turns the policy of the Rural Electrification Act on its head: the point of the Act was to encourage rural electrification through the mechanism of federal loans, *not* by requiring high-density areas to subsidize rural users of electricity.

It therefore is unsurprising that the decision below conflicts with the holdings of state courts that have looked to the policy of the Act. That decision also is in plain tension with this Court's rulings on the scope of preemption. And it cannot be reconciled with the Court's holding in *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983), which rejected arguments identical to those endorsed by the court of appeals. Because the court of appeals' decision improperly transfers authority from Congress to the REA — and does so in an area of great importance to States and municipalities — this Court should grant review.

ARGUMENT

The court of appeals in this case addressed a question left open in *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983): whether a municipality's condemnation of the property of a rural electric cooperative is preempted by the Rural Electrification Act (the "REAct"), 7 U.S.C. 901 *et seq.* The court's answer to that question both worked a fundamental interference with the power of state and local governments, and established an

enormously important practical bar to municipal action. By holding that the REAct preempts the exercise of the State's eminent domain authority, the court below imposed an extraordinary limit on the State's most basic "sovereign prerogative." *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 28 (1959). The practical effect of this holding, moreover, will be to impede municipal governance by erecting a significant obstacle to essentially all municipal annexations that affect rural cooperatives. Given this effect, it comes as no surprise that the ruling below conflicts with the decisions of state courts, departs from the purposes of the REAct, and cannot be reconciled with this Court's holdings. "Because the panel opinion has given REA authority that Congress clearly denied it and that the Supreme Court * * * has also withheld" (Pet. App. 28a (Jones, J., dissenting)), review by this Court is imperative.

1. At the outset, the practical importance of the decision below cannot be overstated. As petitioner notes (at Pet. 3-5 & n.2), rural electric cooperatives serve *over 70%* of the land mass of the United States. At the same time, more than *2000* municipalities — more than 100 of which are in the Fifth Circuit and therefore are directly affected by the decision below — now provide electric power to their residents. As a consequence, the exercise of the municipal condemnation power against rural electric cooperatives occurs with considerable frequency and is a matter of great significance to sound municipal operations. Indeed, the National Rural Electric Cooperative Association itself acknowledges that at least 86 such condemnations took place during the period 1985-1989 (see Pet. 5), and there is no reason to believe that the number has grown smaller in the intervening years.

The decision below, however, announced what amounts to a categorical rule precluding the municipal exercise of eminent domain against rural electric cooperatives. While the court of appeals briefly adverted to the record in suggesting that it did not state a per se rule of preemption (see Pet. App.

10a, 26a-27a), the court did not ask whether the condemnation here *actually* would frustrate the purposes of the REAct. The court thus pointedly did *not* require a showing that the challenged municipal action would render SLECA (or any other cooperative) insolvent,[1] or would interfere with SLECA's repayment of federal loans; the court found it enough that the condemnation would reduce SLECA's revenues and operating margins. See Pet. App. 27a; see also *id.* at 10a (stating generality that condemnation "could well leave" cooperatives unable to service customers).[2] But that, of course, will be true of virtually *every* condemnation, meaning that the court of appeals has stated a rule of absolute preemption. The judges dissenting

---

[1] Indeed, Cajun recently entered bankruptcy proceedings for reasons entirely unrelated to the proposed condemnation at issue in this case. See Pet. App. 28a n.3.

[2] It should be noted that the REA report cited by the court of appeals (see Pet. App. 10a, 26a-27a) went no further in its factual findings. The report did not find that the condemnation would lead to SLECA's insolvency or would preclude it from repaying its loans. Instead, the REA's conclusions were phrased in terms of generalities: it asserted that, "[w]hile qualification is difficult," condemnation would "adversely affect SLECA's rates and financial health" (*id.* at 73a); that "the interests of REA and the federal taxpayer in maximizing recovery on outstanding loans [to Cajun] will be frustrated" (*id.* at 74a); and that this would "adversely affect remaining RE Act beneficiaries served by the system." *Ibid.* The same general conclusions could be made about literally *any* exercise of eminent domain authority against a cooperative. In addition, of course, "whether there is an actual conflict that 'frustrates the ability to repay REA-backed loans' raises a factual question. Yet no hearing or trial occurred here, despite conflicting affidavits of competent experts on both sides." Pet. App. 31a (Jones, J., dissenting) (footnote omitted). This confirms that the rule applied by the court of appeals is, in practice, a categorical one.

below therefore plainly were correct in noting that "most tellingly, if the condemnation of 252 customers, a mere one percent of those served by SLECA, 'frustrates' a federal purpose, then what exercise of eminent domain would not do so? The practical effect of the panel's decision is much broader than its self-deprecating language would suggest." Pet. App. 32a.

Equally as important, the decision below will have the practical effect of precluding most municipal annexations that affect rural electric cooperatives, even if the rule announced by the court of appeals somehow does leave room for the occasional condemnation to escape preemption. As petitioner explains (at Pet. 3-4), the opportunity to provide utility service to areas that are newly annexed by a municipality — and therefore to obtain new sources of revenue that might help finance other municipal services in the annexed area — typically is an important factor in the decision to annex. But if the legality of a condemnation must turn on an after-the-fact, case-by-case, and standardless determination by a federal judge, guided only by the vague exhortation that the condemnation not "jeopardize the federal rural electrification program" (Pet. App. 10a), it will be impossible for a municipality ever to know in advance whether it will be permitted to expand utility service to a newly annexed area. This will make municipal planning impossible, and will preclude prudent municipalities from ever implementing annexations that affect rural electric cooperatives. Arguing to the contrary, SLECA maintains (at Br. in Opp. 3) that the annexation here "had nothing whatsoever to do with the expropriation which followed many years later." As SLECA acknowledges (see *ibid.*), however, the condemnation followed years of unsuccessful negotiations between the utility and petitioner, which makes clear that the provision of utility service to the residents of the newly annexed area always was understood to be central to the annexation.

2. The court below nevertheless insisted that its rule was compelled by the policy of the REAct, maintaining that preemption is necessary because condemnation of an "economically profitable service area" might "leave federally funded cooperatives financially unable to continue service to the remaining low-density areas." Pet. App. 10a. As an initial matter, we note that it is difficult to see how this *ever* could be the case when condemnation must be accompanied by the payment of just compensation.[3] More fundamentally, however, the holding below turns the policy of the REAct neatly on its head. The point of the Act, of course, is to encourage "*rural* electrification and the furnishing of electric energy to persons in *rural* areas." 7 U.S.C. 902(a) (emphasis added). The Act by its very terms therefore is directed at areas of low population density that are "not included within the boundaries of any urban area, as defined by the Bureau of the Census." 7 U.S.C. 913.

Here, however, respondents and the court of appeals are challenging the condemnation precisely because it "skim[s] the cream" (SLECA Br. in Opp. 17) by affecting an area that is "densely populated" (Pet. App. 10a) — that is to say, an area that is *urban* in character. But the policy of the Act manifestly was not to require that high-density (and therefore more profitable) urban areas subsidize rural users of electricity through the forced inclusion of urban dwellers in rural cooperatives; instead, Congress authorized the REA to encourage rural electrification through the very different

---

[3] Cajun (at Br. in Opp. 13) maintains that it is unfair for a municipality to take an area "which has been developed on the strength of federal loan funds," while SLECA complains (at Br. in Opp. 5-7) that the compensation offered for the taking was inadequate. But the adequacy of the payment (which necessarily will provide compensation for value generated by the federal loans), which may be challenged in a state-court proceeding, has nothing whatever to do with the propriety of preemption.

device of making federal loans to rural electric cooperatives, with the understanding that the cooperatives generally would be subject to state law. See *Arkansas Electric Cooperative Corp.*, 461 U.S. at 386-387; *Wabash Valley Power Ass'n* v. *REA*, 903 F.2d 445, 454 (7th Cir. 1990), citing *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979).[4] And while the court below worried that the exercise of eminent domain authority could lead cooperatives to default on the repayment of their loans and hence to the collapse of the rural electric cooperative system, the dissenting judges below correctly explained that "'Congress's assumption when it created the Rural Electrification Act in 1936 seems to have been that the REA could protect itself [from this parade of horribles] by setting conditions on the extension of credit.'" Pet. App. 33a, quoting *Wabash Valley Power Ass'n*, 903 F.2d at 453 (bracketed material added by the court).

Indeed, this point is proven by the REA's own regulations, which direct that the agency, in evaluating loan feasibility, look to "[r]isks of loss of portions of the borrower's service territory from annexation or other causes." 7 C.F.R. 1710.112(b)(5). In this setting, where REA must take the possibility of annexation and condemnation into effect *before* issuing a loan, "the present published policy of the REA is wholly inconsistent with pre-emption." *Arkansas Electric Cooperative Corp.*, 461 U.S. at 376. The same

---

[4] During the debate on the REA, rural electric cooperatives generally were analogized to "other business organization[s]." 80 Cong. Rec. 5315 (1936) (Rep. Rayburn). See *id.* at 5314-5315 (Rep. Rayburn) ("I am of the opinion that the loans made on the sort of set-up which will be approved by the Rural Electrification Administration will in 95 percent of the cases pay out. Of course, there is no class of business in the world that is successful 100 percent, and in which there are not some losses."). There was no suggestion that cooperatives would be distinguished from other businesses by receiving an immunity from the effect of state law.

conclusion is suggested by Congress's decision to include express limits on municipal annexation authority in *other* statutes. See, *e.g.*, 7 U.S.C. 1926(b) (water association service area "shall not be curtailed or limited by the inclusion of the area served by such association within the boundaries of any municipal corporation"). Such language was pointedly *omitted* from the REAct.

The court of appeals' decision and the contentions of respondents thus have the perverse effect of exalting the federal agency's bureaucratic interest in collecting on its loans over the policy endorsed by Congress. As Judge Easterbrook wrote for the Seventh Circuit of a similar argument made by the REA:

> After all, the REA made its loans and guarantees on the assumption that state regulation would apply. * * * [This] may have led to an adjustment in the interest rate [demanded by the REA], which, in turn, increases the rates [the rural utility] charges. (If there was no adjustment, people at REA were asleep on the job.) When the risk materialized, the REA has demanded shelter of federal law *plus* the interest rate that reflected the risk created by state law. Nice cushion, if you can get it.

Wabash Valley Power Ass'n, 903 F.2d at 455 (emphasis in original). In this setting, it is hardly surprising that the REA has not "always welcomed state regulation of rural power cooperatives, or thought it was a good idea. But, of course, such expressions of opinion do not constitute sufficient grounds for pre-emption." *Arkansas Electric Cooperative Ass'n*, 461 U.S. at 386 n.10. "'Frustration of purpose' preemption should not be allowed drastically to expand a federal lending agency's authority where Congress expressly contemplated it would play by local regulatory rules." Pet. App. 34a (Jones, J., dissenting).

3. It also is unsurprising that the decision below is in clear conflict with the holdings of state courts that have looked to the policy of the REAct. Thus the Indiana Supreme Court explained that

> [i]t is only logical that once an area serviced by a[] [rural electric cooperative] is incorporated into a municipality already serviced by an electric utility, it loses its rural identity. The justification for the continued existence of the [rural electric cooperative] in such an area no longer exists — its objective having been accomplished. This result is not only reasonable, but is fully within the ambit of statutory purposes and goals.

Decatur County Rural Electric Membership Corp. v. *Public Service Co.*, 301 N.E.2d 191 (Ind. 1973). Upholding a municipal condemnation, the court accordingly concluded that

> [a]fter a reading of the Rural Electrification Act, we are unable to discern any clash between the State of Indiana and the United States. As we have stated, the purpose for a [rural electric cooperative's] existence expires when the area becomes "urbanized." Once an area, which was theretofore "rural," is included within a municipality of 1,500 or more and becomes urban, it clearly falls outside the ambit of the Rural Electrification Act. Therefore, Section 18A [a statute permitting condemnation of rural utility property] in no way contravenes the Supremacy Clause.

Ibid.[5]

---

[5] The court's reference to municipalities with a population of 1500 derives from the REAct's original definition of "rural area," which included areas outside the boundaries of any "city, village, or borough having a population in excess of fifteen hundred inhabitants." Act of May 20, 1936, ch. 432, Title I, § 13, 49 Stat. 1367. As noted above, the definition has since been revised to include "any area of the United States not included within the

Similarly, in *City of Rochester* v. *Peoples Cooperative Power Ass'n, Inc.*, 505 N.W.2d 621 (Minn. App. 1993), the Minnesota Court of Appeals explained that "[t]he stated purpose of the RE Act is to make loans 'for rural electrification and the furnishing of electric energy to persons in rural areas.'" *Id.* at 625, quoting 7 U.S.C. 902. As a consequence, "after the City annexed the [area at issue], such area became 'urban'; therefore any subsequent condemnation of the utility property in that area did not interfere with the purpose of the RE Act." *Ibid.* The Minnesota court thus expressly rejected both the reasoning of the district court in this case and the Ninth Circuit holdings that were relied upon by the court below. *Id.* at 625-626, citing *Public Utility Dist. No. 1 of Franklin County* v. *Big Bend Electric Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980); *Public Utility Dist. No. 1 of Pend Oreille County* v. *United States*, 417 U.S. 200 (9th Cir. 1969).

These state-court decisions cannot be reconciled with the holding below. The state courts' premise — that the condemnation of utility property in an urban area necessarily is consistent with the purposes of the REAct — is flatly inconsistent with the court of appeals' conclusion that "high-density service areas" should subsidize the operations of rural electric cooperatives. Pet. App. 10a.[6] Review by this Court

---

boundaries of any urban area." 7 U.S.C. 913.

[6] Cajun (at Br. in Opp. 13) seeks to distinguish *Decatur County* on the ground that "the United States did not participate in the *Decatur* proceeding and did not object to the acquisition on preemption grounds," and that there was no "compiled factual record" bearing on preemption in that case. But the decision below did not turn on the participation of the United States in the case, and the *Decatur* court's rationale made a factual record there irrelevant. Cajun's factual distinction therefore is simply beside the point. Cajun also notes (at Br. in Opp. 14) the observation in *City*

to resolve the conflicting decisions of federal and state courts on the issue therefore is warranted.

4. The court of appeals' decision also is in plain tension with this Court's holdings. Petitioner demonstrates (at Pet. 17-18) that the court of appeals' approach cannot be reconciled with this Court's general preemption doctrine, and we will not repeat that argument here. The Court's most recent (and unanimous) preemption decision does bear emphasis, however. In *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995), the Court explained that

> despite the variety of the[] opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. See *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, see *Hillsborough County* v. *Automated Medical Laboratories*, 471 U.S. 707, 719 (1985), we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest

---

of Rochester that condemnation might be preempted if "such condemnation so seriously compromises the REA's interests * * * as to be implicitly preempted." 505 N.W.2d at 626. The court immediately went on to hold, however, that "[i]n the present case, the United States has not demonstrated that the City's condemnation of [the] utility rights will compromise the REA's interests to a greater degree than any other condemnation." *Ibid.* As we have explained, the same thing is true here: the court below did not ask for, and the REA did not provide, anything more than a conclusory assertion that the condemnation could interfere with federal interests.

purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)].

Respondents maintain that they make out such a "clear and manifest purpose" by offering a simple syllogism: condemnation may impose financial burdens on rural electric cooperatives; Congress wished to encourage such cooperatives; therefore condemnation is preempted. But the Court rejected an essentially identical argument in *Travelers* itself, where state law was challenged on the ground that it imposed financial burdens on (and therefore coerced particular actions by) certain ERISA plans. See 115 S. Ct. at 1675-1676. Noting that this argument has no logical stopping point, the Court found "not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." *Id.* at 1681. And if that was true in *Travelers* — notwithstanding ERISA's express and "clearly expansive" preemption provision (*id.* at 1677) — there surely should be no preemption in this case, where the federal statute contains *no* preemption provision at all, where the legislative history militates *against* preemption, and where, as petitioner observes (at Pet. 18), the challenged municipal action involves an exercise of the State's most fundamental sovereign power. See *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25, 28 (1959); *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U.S. 239, 257 (1905) (Holmes, J., dissenting).

5. Finally, as the dissenting judges below explained (see Pet. App. 29a-31a), the court of appeals simply took no account of this Court's decision in *Arkansas Electric Cooperative Corp.* Challenging state regulation of the rates of rural electric cooperatives, the REA argued there (as we imagine it will argue here) that state regulation could threaten both "'the security * * * afforded for payment of the [REA] loan'" and the REA's policy of having costs "'shared in a manner which, over the long run, benefits all by the creation of a sound, extensive rural electric system.'" 461 U.S. at

385, 386 (citation omitted). In rejecting those contentions, the Court pointed to two considerations. "First, the legislative history of the Rural Electrification Act makes abundantly clear that, although the REA was expected to play a role in assisting the fledgling rural power cooperatives in setting their rate structures, *it would do so within the constraints of existing state regulatory schemes.*" *Id.* at 386 (emphasis added), citing 80 Cong. Rec. 5316 (1936) (Rep. Lea); Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 30, 37, 51, 52 (1936). And "[s]econd, the present published policy of the REA is wholly inconsistent with pre-emption of state regulatory jurisdiction." *Id.* at 387.

These considerations confirm that preemption is inappropriate here as well. The arguments for preemption in *Arkansas Electric* were identical to those offered by the court of appeals in this case. See Pet. App. 10a. There is no reason to doubt that Congress expected rural electric cooperatives to operate "within the constraints" of state eminent domain law, just as they must function within the limits of state rate regulation; to the contrary, as Judge Jones observed below,

> [s]urely, if state rate regulation is permitted, though it contains the power to hobble a federally financed cooperative, then the eminent domain power — exercisable only on payment of just compensation — has not been overridden by statute or, even more vaguely, by a conclusional judicial stamp labelled "frustration of purpose."

Pet. App. 28a (footnote omitted). And as we have explained (at 7-8), the "published policy of the REA" makes clear that any burden imposed upon the cooperative by condemnation must be taken into account *before* the REA issues a loan, and not as part of an after-the-fact effort by the "federal lending

agency to get more than its due at the expense of local sovereignty." Pet. App. 32a.

In its opinion on rehearing, the court of appeals tried to explain away *Arkansas Electric Cooperative Corp.* by pointing to this Court's caveat that "a particular rate set by [the state utility commission] may so seriously compromise important federal interests, including the ability of the [rural electric cooperative] to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act." 461 U.S. at 389. The court of appeals took this language to "confirm[]" that preemption is appropriate here. Pet. App. 25a. In fact, however, the Court's statement did no more than leave open a "possible exception[]" to the rule of nonpreemption. *Wabash Valley Power Ass'n*, 903 F.2d at 452. See Pet. App. 30a (Jones, J., dissenting) ("*Arkansas Electric* did not entirely foreclose the possibility that a particular rate may * * * be impliedly preempted"). However that possibility is resolved with regard to rate regulation, we doubt — given the requirement of just compensation — that preemption of an eminent domain proceeding *ever* could be appropriate under the Act on the theory that it worked a financial hardship on the rural cooperative. And as we have explained (at 3-4 & n.2), there are, in any event, no findings here demonstrating that condemnation actually would frustrate a federal purpose. If preemption nevertheless may be appropriate in a case such as this one, further review to clarify the controlling standards is essential.

6. In sum, as Judge Jones explained below, the decision in this case takes authority from Congress, the administrative rule-making process, and local authorities; it transfers that authority to "REA officials, without benefit of express statutory authority or regulation," and to "federal judges, who have the final, delphic say in what constitutes a 'frustration of purpose.'" Pet. App. 34a. Because this "breathtaking federal power-grab by REA" (*id.* at 28a) involves a seemingly limitless expansion of preemption

doctrine — and because it occurs in an area that is of immense practical importance to States and municipalities — review by this Court is in order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES A. ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

AUGUST 1995